



**Lumbasi v Republic (Criminal Appeal 17 of 2016)
[2016] KEHC 2942 (KLR) (18 August 2016) (Judgment)**

George Muchika Lumbasi v Republic [2016] eKLR

Neutral citation: [2016] KEHC 2942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 17 OF 2016
EC MWITA, J
AUGUST 18, 2016**

BETWEEN

GEORGE MUCHIKA LUMBASI APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No. 189 of 2015 in the Principal Magistrate’s Court at Vibiga, (Hon J.A. Orwa, PM) dated 18th February, 2016)

The absence of medical examination does not make a charge of defilement defective.

A proper reading of section 124 of the Evidence Act showed that corroboration was required on evidence by minors but was not mandatory in sexual offences as long as the witness was truthful and reasons were recorded. Therefore the proviso to section 124 was not discriminatory, unconstitutional or that it violated articles 25 and 27 of the Constitution of Kenya, 2010. Further, section 36 of the Sexual Offences Act, which allowed the court to make an order that an accused be subjected to a medical examination, did not make medical examination mandatory except where the court thought it was appropriate in the circumstances of a case. Sexual assault was proved by evidence and not by medical examination.

Reported by Nelson Tunoi & Silas Kandie

Statutes – interpretation of statutes – interpretation of section 124 of the Evidence Act – whether section 124 of the Evidence Act violated article 50 the Constitution of Kenya, 2010 – whether section 124 of the Evidence Act was unconstitutional - guiding principles in determining unconstitutionality of statute - Constitution of Kenya, 2010, article 159

Evidence – minor – evidence of a child of tender years – procedure in receiving the evidence of such a child – whether the evidence of a child who was defiled must be corroborated- Evidence Act, cap 80, section 124; Oaths and Statutory Statements Act, cap 15, section 19



Brief facts

The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, (No 3 of 2006). On March 8, 2015, in Vihiga County within western region he unlawfully and intentionally caused his penis to penetrate the vagina of D.E.M, a girl of 7 years. In the alternative, he was charged with indecent act contrary to section 11(1) of the Sexual Offences Act (No 3 of 2006). It was alleged that on March 8, 2015, he intentionally and unlawfully caused his penis to touch the vagina of D.E.M, a girl aged 7 years.

The appellant pleaded not guilty to both the main as well as the alternative charge, and in the ensued trial in which the prosecution called five witnesses and the appellant's defence, he was found guilty, convicted and sentenced to life imprisonment. Aggrieved, he lodged the instant appeal against both conviction and sentence.

Issues

- i. Whether the absence of medical examination made the charge of defilement defective.
- ii. Whether section 124 of the Evidence Act was discriminatory in the standard of proof applicable in different cases.

Relevant provisions of the Law

Evidence Act, section 124

Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

Held

1. The failure to call witnesses in the trial court did not cause any prejudice to the appellant nor did it weaken the prosecution's case. The evidence led was enough to prove the offence the appellant was charged with. The standard of proof was neither lowered nor shifted due to that finding by the trial court.
2. Article 27 of the Constitution of Kenya, 2010 outlawed discrimination and every person had equal protection before the law. Article 25(c) on the other hand provided that a right to a fair trial could not be limited. There were many facets to the right to a fair trial, and it did not begin and end with the trial itself. The appellant had not pointed out precisely what was violated to make his trial fall short of article 50 of the Constitution of Kenya, 2010 regarding fair trial.
3. There was no discrimination or unconstitutionality in the proviso to section 124 of the Evidence Act. The law prior to the introduction of the proviso was that corroboration was required as a matter of practice in sexual offences in Kenya. The Court of Appeal had taken the view that the requirement for corroboration in sexual offences put more burden on women and minors to prove sexual offense committed against them yet there was no similar requirement in any other cases against them. That was the discrimination and unconstitutionality the court was talking about because a sexual victim's evidence alone could not find a conviction of her attacker however truthful, without corroboration.
4. The proviso to section 124 had not introduced discrimination such as to make it unconstitutional. In fact without the proviso, the converse would be the case such that the requirement for corroboration in sexual offences committed against women and children would be against the principle of equal protection under the law under article 27 of the Constitution of Kenya, 2010.
5. A proper reading of the whole of section 124 of the Evidence Act showed that corroboration was still required on evidence by minors, but not mandatory in sexual offences as long as the witness was truthful and reasons were recorded. And as the long line of decisions had shown, proof in sexual offences could still be



achieved through the victim's evidence, medical evidence, circumstantial evidence or a combination of any or all of them. In sexual cases, corroboration was necessary as a matter of practice to support the testimony of the complainant. Therefore the proviso to section 124 was not discriminatory, unconstitutional or that it violated articles 25 and 27 of the Constitution of Kenya, 2010.

6. Section 122A of the Penal Code allowed the police to order a suspect to undergo medical examination where the offence was serious. However, being a sexual offence, the more appropriate provision was section 36 of the Sexual Offences Act, which allowed the Court to make an order that an accused be subjected to a medical examination. The section did not make medical examination mandatory except where the Court thought it was appropriate in the circumstances of the case to subject an Accused to medical examination under section 36 was discretionary.

7. Despite the existence of section 36 of the Sexual Offences Act, it was settled law that sexual assault was proved by evidence and not by medical examination. Evidence by the victim or even circumstantial evidence was enough to prove rape or defilement as the case might be. The fact of rape or defilement was not proved by way of a DNA test but by way of evidence.

8. The trial court conducted *voir dire* examination and was satisfied that the complainant was possessed of sufficient knowledge on the need to tell the truth, thus allowed her to be affirmed. After her evidence in chief, she went through cross examination without a hitch. It could not therefore be argued that there was no evidence to link the Appellant to the offence of defilement or the prosecution did not prove its case beyond reasonable doubt. The complainant's evidence, that of PW1 and the P3 form proved the case of defilement against the Appellant.

9. The statement complained of did not in any way prejudice the appellant. The appellant, who was represented by an advocate, was given the opportunity to cross examine PW4; therefore article 50(1) of the Constitution was not violated in any way. The statement that the witness was intelligent and truthful could not, without more, be a basis for concluding that the trial court was partial. The statement was informed by the questions put to PW4 and the answers to those questions. It was not prejudicial to the Appellant.

10. The trial court properly addressed itself on the evidence and the law and came to the right conclusion that based on the evidence on record, corroboration by other evidence was not required. There was credible and tangible evidence before court that proved the offence of defilement. The sentence meted out was legal.

Appeal dismissed.

Citations

Cases

1. *AML v Republic Criminal Appeal 74 of 2011*; [2012] KEHC 2554 (KLR) — Explained
2. *Gitau, Benjamin Mbugua v Republic Criminal Appeal 257 of 2009*; [2011] KECA 333 (KLR) — Explained
3. *JWA v Republic Criminal Appeal 100 of 2013*; [2014] KECA 484 (KLR) — Explained
4. *Kamau, David Muturi v Republic Criminal Appeal 99 of 2014*; [2015] KECA 749 (KLR) — Explained
5. *Kassim Ali v Republic Criminal Appeal 84 of 2005*; [2006] KECA 156 (KLR) — Explained
6. *Mohamed v Republic* [2006] 2 KLR 138 — Explained
7. *Mutungwa, Julius Kalewa v Republic Criminal Appeal 31 of 2005*; [2006] KECA 79 (KLR) — Explained
8. *Mwaura, Joseph Njuguna & 2 others v Republic* [2013] eKLR — Explained
9. *Ngui, Fappyton Mutuku v Republic Criminal Appeal 32 of 2013*; [2014] KECA 570 (KLR) — Explained
10. *Republic v Gachanja* Petition 40 of 2000; [2001] KEHC 197 (KLR); [2001] KLR 425) — Explained

Regional Court



1. Mukungu v Republic [2002] EA 482)— Explained
2. Okeno v Republic [1972] EA 32 — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) articles 25(1)(c); 27(1)(2); 50(1) — Interpreted
2. Evidence Act (cap 80) section 124 — Interpreted
3. Penal Code (cap 63) section 122A — Interpreted
4. Sexual Offences Act (cap 63A) sections 2, 8(1)(2); 11(1); 36 — Interpreted

Advocates

None mentioned

JUDGMENT

1. The appellant, George Muchika Lumbasi, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, (No 3 of 2006). Particulars of the charge were that, on the 8th day of March 2015, at in Vihiga County thin Western region, unlawfully and intentionally caused his penis to penetrate the vagina of DEM, a girl of 7 years.
2. In the alternative, he was charged with indecent act contrary to section 11(1) of the *Sexual Offences Act* (No 3 of 2006). It was alleged that on the 8th day of March 2015, at [particulars withheld] Sub-location, Wamuluma Location in Vihiga County within Western Region intentionally and unlawfully caused his penis to touch the vagina of DEM, a girl aged 7 years.
3. The appellant pleaded not guilty to both the main as well as the alternative charge, and in the ensued trial in which the prosecution called five witnesses and the appellant's defence, he was found guilty, convicted and sentenced to life imprisonment.
4. Dissatisfied with conviction and sentence, the appellant preferred an appeal to this court and raised six (6) grounds of appeal, namely:-

- “ 1. That the learned trial magistrate erred in law and in fact in finding that the prosecution had proved its case beyond all reasonable doubt contrary to the evidence on record.
2. That the learned trial magistrate erred in law and in fact in relying on section 124 of the *Evidence Act* in the face of serious gaps in the evidence of the prosecution.
3. That the learned trial magistrate placed undue reliance on section 124 of the Evidence (sic) to the detriment of the appellant leading to the shifting and lowering the burden of proof.
4. That the application of section 124 on Sexual Offences is contrary to article 27 of the *Constitution* and against the principle of criminal law and its application was prejudicial to the appellant's case.
5. That the learned trial magistrate erred in law and in fact in holding that in the circumstances of this case, there was no need for corroboration.
6. That the learned magistrate erred in law and in fact in dismissing the appellant's defence contrary to the evidence on record.”



5. During the hearing of this appeal, Mr Anziya appeared for the appellant, while Mr Oroni was for the respondent. Mr Anziya, learned counsel for the appellant, submitted that the prosecution did not prove its case to the required standard. Counsel pointed out the evidence of PW1, (clinical officer), which confirmed that the victim had a sexually transmitted infection (STI). The p3 from also confirmed this. Counsel also pointed to the evidence of PW5, the investigating officer, who said that she did not talk to the Doctor but saw treatment notes and did not know that the complainant was suffering from an STI.
6. According to counsel, section 122A of the *Penal Code*, enjoins the police to order an accused to undergo a DNA test which was not done in this case, although the offence alleged was serious. Counsel submitted that for this failure, the fact that the appellant had an STI was not established; This counsel submitted, was critical in proving that the appellant committed the offence, and the failure to conduct a medical examination was fatal to the prosecution's case.
7. Learned counsel further took issue with the prosecution for failing to call as witnesses, the people the complainant was playing with before the alleged assault, and who according to counsel, were important witnesses. Counsel again faulted the trial court in stating that corroboration was not necessary in this case, and for making a finding that the complainant minor was intelligent before the minor testified.
8. Learned counsel referred to article 50(1) of the *Constitution* which requires that a dispute be determined in a fair manner by an impartial court or tribunal "A criminal case has to be proved beyond reasonable doubt" counsel submitted. Counsel again faulted the trial court for relying on section 124 of the Evidence Act to exclude requirement for corroboration and submitted that reliance of section 124 does not exclude article 50 of the *Constitution*. He also submitted that the proviso to section 124 is contrary to article 27(1)(2) of the *Constitution* – non discrimination of offenders. Counsel referred to article 25(1)(c), submitting that a right to a fair trial cannot be limited, and according to counsel, fair trial includes hearing before an independent court and proof beyond reasonable doubt.
9. Mr Anziya yet again, faulted the trial court saying that it took into account, only evidence in chief and not in cross examination. He pointed out where PW4 said she did not bleed, but both the P3 and PW1 showed the hymen was broken and there was bleeding. Counsel wound up his submissions by referring to the decision in the case of *Mukungu v Republic* [2002] EA 482 for the proposition that there should be no discrimination.
10. Mr Oroni, learned prosecution counsel, opposed the appeal and relied on the prosecution evidence on record. He pointed out to the evidence of PW4, (the complainant), whom the trial court found intelligent. Learned counsel submitted that the offence was committed on March 8, 2015 while he appellant was arrested on March 27, 2015, a period of more than 22 days, hence it was not possible to subject the appellant to a DNA examination or test to establish whether he had an STI and he committed the offence.
11. According to learned counsel, the complainant's evidence connected the appellant to the offence, and her evidence was corroborated by that of PW1 (the clinical officer). He also submitted that failure to call the children who were playing with PW4 as witnesses was not fatal. He urged that the appeal be dismissed.
12. I have considered this appeal, submissions by counsel and authority cited. I have also perused the record of the proceedings before the trial court. This being a first appeal, it is the duty of this court to re-evaluated the evidence, assess it itself and determine whether conclusions of the trial court should stand, and give reasons for that. However, the court should bear in mind that it neither saw nor heard the witnesses testify and give due allowance for that (see *Okeno v Republic*, [1972] EA 32.) In the case



of *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR, the Court of Appeal restated that duly thus:-

“It is common place that the first appellate court is mandated to re-consider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own.”

13. The evidence before the trial court as told by PW1, Samy Chelule, a Senior Clinical Officer based at Vihiga Hospital was that he attended to the complainant who had a history of defilement. The minor aged 7 years had a healing torn hymen with black and red marks and tenderness on the labia which was also healing. There was a brownish discharge with foul smell as well as pus from the genitalia. Laboratory tests showed infection of the urinary tract. He formed the opinion that the complainant had been defiled. He filled a P3 form which he produced as PEx1, Laboratory report as PEx2, Treatment notes and prescription chit as PEx 3(a) and (b), and, post rape care form as PEx 4. In cross examination the witness told the court that the minor was 7 years, 3 months at the time of examination. He also testified that the cervix was intact which means penetration never reached the cervix. He told the court that the high vaginal swab revealed pus, a sign infection.
14. PW2, SLJ, told the court that on March 12, 2015, she received a report of defilement of the complainant, she called the complainant to her office who disclosed to her that she had been defiled by one George. The witness directed that the complainant be taken to Hospital for examination, and informed her mother.
15. PW3, SM, mother to the complainant, told the court that she received a call from PW2 on March 13, 2015 informing her that the complainant had confided to her that she had been defiled by a neighbour. PW3 interrogated the complainant who informed her that she had been defiled by the appellant. On examining the complainant's genitalia, she found a discharge with foul smell. PW3 escorted the complainant to hospital for examination and treatment. According to PW3, the complainant was born on December 13, 2007 – she identified the appellant as, the person who the complainant said had defiled her. PW3 reported the matter to the police on March 16, 2015.
16. PW4, DEM, the complainant, told the court that the appellant led her to his bed room, removed her pair of trousers and party, removed his own trousers, placed her on the bed and defiled her after stuffing hand kerchiefs in her mouth. He threatened to kill her if she made noise, and gave her 5/- when he was done. The complainant told the court that she feared telling her mother because she had been threatened by the appellant. She later informed PW2. She identified the appellant in the dock as the person who defiled her.
17. PW5, No 83771 CPL Elizabeth Akinyi, testified that on March 6, 2015 she received a report of defilement of the complainant which was said to take place on March 8, 2015, and that she had been treated on March 16, 2015. The witness issued the complainant with a P3 form. PW5 then proceeded to the complainant's school where she met PW2 and recorded her statement. The appellant was arrested on March 27, 2016 and charged. The age of the complainant was ascertained through her birth certificate which she produced as PEx5. In cross examination, the witness told the court that she did not record statements from the children who were playing with the complainant because in her opinion, it was unnecessary. She also told the court that she properly investigated the case and saw the treatment notes and P3 form hence the charges against the appellant.
18. When put on his defence, the appellant gave a sworn statement. He told the court that on March 8, 2015, he was sent to buy drugs for his sick mother and thereafter went to Mbale. He came back at 6 p.m. and found his brothers, sisters and mother at home. The appellant told the court that he never saw



the complainant on that day, and denied defiling her. He said he had seen the complainant prior to the occurrence of the incident and knew her. After considering the evidence on record, the trial magistrate convicted the appellant and sentenced him to life imprisonment provoking this appeal.

19. The appellant's first ground of attack is that the learned magistrate was in error in finding that the prosecution had proved its case beyond reasonable doubt, which was contrary to the evidence on record. In other words the appellant was of the view that the contrary was the case. PW1 the clinical officer who examined the complainant, found that the complainant had a torn hymen with black and red marks, a sign that it was healing. The labia was tender, also a sign that it was healing. The cervix and vagina were however intact. A brown discharge with foul smell as well as pus from the genitalia were noted. The complainant had an infection. All led the witness to conclude that the complainant had been sexually assaulted. The P3 form produced by the witness confirmed these findings; Post rape care form (PEX4) also confirmed that there was penetration causing vaginal harm.
20. The evidence of PW2, who raised the issue was that she was informed by the class teacher to the complainant and on interrogating the complainant, she learnt that the complainant had been defiled. She referred the complainant to hospital for examination and treatment and informed.

PW3 who interrogated the complainant and she revealed to her that she had been defiled by the appellant. She examined the minor and found injuries in her genitalia. She took the minor to hospital for examination and treatment and reported the matter to police. The complainant herself testified that she was defiled by none other than the appellant, a neighbour she knew. She explained in detail how it happened. She mentioned the appellant both to PW2, PW3 and also identified him in court.
21. The evidence of the minor (PW1) that she had been defiled and the medical evidence from PW1, was clear that indeed there had been defilement. The complainant was also clear in her testimony that the person who defiled her was known to her and that it was the appellant.
22. Under section 8(1) of the *Sexual Offences Act*, (No 3 of 2006), a person who commits an act which causes Penetration with a child commits an offence known as defilement. Under the Act, the prosecution is required to prove that the victim was a minor and that there was penetration by the appellant's genital organ into the genital organ of the complainant. Section 2 of the AC defines "Penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The court was told that the complainant was a minor aged 7 years. The birth certificate produced in court, showed that the minor was born on 13th December, 2007. That means by March 8, 2015 she was about 7 years. This was also confirmed by PW1 and PW3. The complainant told the court that she was defiled. The evidence of the clinical officer (PW1) was that there was penetration. The P3 form and post rape care form also confirmed this. The torn hymen was evidence of penetration. This evidence therefore proved beyond reasonable doubt that there was defilement as contemplated by the Act.
23. The appellant took issue with the learned magistrates finding saying she over relied on section 124 of the *Evidence Act*, cap 80 laws of Kenya, yet there were serious gaps in the prosecution evidence and also that reliance on that section 124, lowered the standard of proof and shifted the burden. In criminal trials, it is the duty of the prosecution to prove its case beyond reasonable doubt, and that burden should never shift to the accused. In the case of *Republic v Gachanja* [2001] KLR 425, the court held:-

"It is a cardinal principle of law that the burden to prove the guilt of an accused person, lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability."



In the case of *David Muturi Kamau v Republic* [2015] eKLR, the Court of Appeal reiterated that principle stating that it is common ground that the burden of proof lies with the prosecution, and that proof is beyond reasonable doubt.

24. The law still requires corroboration of evidence by minors as is clear from section 124 of the *Evidence Act*. However there is a provision to that section that there need not be corroboration if the court believed the minor told the truth and recorded its reasons. The trial magistrate relied on that proviso to hold that there was no need for corroboration in this case. The section provides:

“Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

25. In her judgment, the learned trial magistrate assessed the evidence of PW4, the complainant and stated

“PW4 gave affirmed evidence, she was taken through voire dire examination by the court. She was composed, calm in her testimony and more so truthful, honest. The incident occurred at day time hence knew DW1 very well. This is a case of recognition as opposed to identification of a suspect. DW1 did not disguise his face or identity when he led PW4 into his bedroom where he defiled her. She described vividly what DW1 did to her in his room. She confirmed that there are two bedrooms in the house where DW1 resides which DW1 confirmed as such in his evidence in cross examination and evidence in chief. No evidence of grudge or bad blood between PW3 or DW1 was put forth by DW1 or PW3 herein. There was no ground for PW4 to implicate DW1 herein. I find that PW4 properly recognised her assailant on the material date who is DW1 herein.”

26. The learned trial magistrate believed the evidence of the complainant as truthful and honest and that she had recognised her assailant. On why corroboration was not necessary, the learned trial magistrate found that the children who were playing with the complainant could not be called because they could not be traced. Secondly, their evidence could only confirm that they had been playing together but not that they witnessed the assault.

27. The reason that the complainant was found truthful and honest is within the proviso to section 124 of the *Evidence Act*. The fact also that those who were playing with the complainant could not be traced or declined to record statements was plausible and the prosecution could not be faulted on this. I find that the learned magistrate did not over rely on section 124 of the *Evidence Act* and the proviso thereto to shift the burden of proof to the appellant. She gave her reasons and that is what the law requires. In the case of *David Muturi Kamau* (supra) where the appellant had been charged with attempted defilement, the Court of Appeal found that the learned magistrate had given reasons why she so heard the complainant and that on that evidence, the prosecution had proved its case beyond reasonable doubt.



28. Moreover, there is a long list of decisions affirming the position that in sexual offences where the victim is a minor, corroboration is no longer necessary as a matter of law. In the case of *JWA v Republic* [2014] eKLR, the Court of Appeal observed:-

“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

A similar position was taken in *Mohamed v Republic* [2006] 2 KLR 138 where the court stated:-

“It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

29. The children who were playing with the complainant were not called which the appellant has not taken lightly, saying they were necessary witnesses. With regard to calling witnesses, the court addressed that issue in *Julius Kalewa Mutunga v Republic*, Criminal Appeal No 32 of 2005, and stated:-

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

The Court of Appeal again addressed that issue in the case of *Benjamin Mbugua Gitau v Republic* [2011] eKLR thus:-

“This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the Evidence Act cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys”

30. In this appeal, the trial magistrate found as a fact that the children who were playing with PW4 could not be called because their evidence was not material to the case before her. I agree with the trial magistrate and add that failure to call those witnesses did not cause any prejudice to the appellant nor did it weaken the prosecution’s case. The evidence led was enough to prove the offence the appellant was charged with. I do not also agree that the standard of proof was either lowered or shifted due to that finding by the trial magistrate.
31. Mr Anziya in furtherance of his argument that the learned magistrate was wrong in finding that corroboration was not necessary, submitted that proof beyond reasonable doubt is a right that cannot be limited and cited articles 25(c) and 27(1)(2) of the *Constitution* to fortify his argument; more so submitting that the proviso to section 124 of the *Evidence Act* is unconstitutional for allowing discrimination of offenders. Learned counsel cited the case of *Mukungu v Republic* (supra) to fortify his argument that the proviso to section 124 was discriminatory.
32. It is true that article 27 of the *Constitution* outlaws discrimination and every person has equal protection before the law. And article 25(c) on the other hand provides that a right to a fair trial cannot be limited. There are many facets to the right to a fair trial, and it does not begin and end with the



- trial itself. The appellant has not pointed out precisely what was violated to make his trial fall short of article 50 of the *Constitution* regarding fair trial.
33. If I understood the appellant's complaint well, it was that the learned magistrate was wrong in applying the proviso to section 124 of the *Evidence Act* to hold that corroboration was not required; which makes the proviso unconstitutional because it brings discrimination in the standard of proof of different cases.
 34. In the *Mukungu* case, John Mwashigadi Mukungu, the appellant had been charged with rape, convicted and sentenced to 10 years. The trial court found that the offence had been proved since the complainant was deemed truthful and that there was corroboration through medical evidence. On appeal to the High Court, it affirmed the trial court's decision. On further appeal to the Court of Appeal, the appeal was dismissed. The Court of Appeal observed that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.
 35. In my view, I do not see any discrimination or unconstitutionality in the proviso to section 124 of the *Evidence Act*. The law prior to the introduction of the proviso, was that corroboration was required as a matter of practice in sexual offences in this country. The Court of Appeal's decision in Mukungu's case triggered an amendment to section 124 which introduced the proviso. The Court of Appeal had taken the view that the requirement for corroboration in sexual offences put more burden on women and minor children to prove sexual offense committed against them yet there was no similar requirement in any other cases against them. That was the discrimination and unconstitutionality the court was talking about because a sexual victim's evidence alone could not found a conviction of her attacker however truthful, without corroboration.
 36. I do not therefore agree with learned counsel's submission that the proviso to section 124 has introduced discrimination such as to make it unconstitutional. Infact without the proviso, the converse would be the case such that the requirement for corroboration in sexual offences committed against women and children would be against the principle of equal protection under the law under article 27 of the *Constitution*.
 37. A proper reading of the whole of section 124 of the *Evidence Act*, shows that corroboration is still required on evidence by minors, but not mandatory in sexual offences as long as the witness was truthful and reasons are recorded. And as the long line of decisions has shown, proof in sexual offences can still be achieved through the victim's evidence, medical evidence, circumstantial evidence or a combination of any or all of them. And as stated in *Mukungu's* case (*supra*). Corroboration is in effect other evidence to give certainty or lend support to a statement of fact. In sexual cases, corroboration is necessary as a matter of practice, to support the testimony of the complainant. I am unable to hold that the proviso to section 124 is discriminatory, unconstitutional or that it violates articles 25 and 27 of the *Constitution*.
 38. Learned counsel for the appellant further submitted that failure by the police to subject the appellant to DNA or medical examination under section 122A of the *Penal Code*, to establish that he was the one responsible for defilement, was fatal to the prosecution's case. According to counsel, that examination would have given crucial evidence in this case. The learned trial magistrate in her judgment held that the time span between the time the complainant was defiled and the time of the appellant's arrested was long and if subject to a medical examination, it may not have yielded a suitable result due to time lapse. She therefore found that medical examination was not necessary in the circumstances, which did not go down well with the appellant.
 39. It is true that section 122A of the *Penal Code* allows the police to order a suspect to undergo medical examination where the offence is serious. However, in my view, this being a sexual offence, the more



appropriate provisions is section 36 of the *Sexual Offences Act*, which allows the court to make an order that an accused be subjected to a medical examination. The section does not make medical examination mandatory except where the court thinks it is appropriate in the circumstances of the case, to subject an accused to medical examination under section 36 is discretionary.

40. Despite the existence of section 36, it is now settled law that sexual assault is proved by evidence and not by medical examination. Evidence by the victim or even circumstantial evidence is enough to prove rape or defilement as the case may be. In the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR while considering a similar issue of medical examination in a defilement case, the Court of Appeal stated:-

“In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2’s testimony which was trustworthy as to the person who had defiled her.”

A similar issue had arisen in the case of *AML v Republic* [2012] eKLR where the court held the same position stating:-

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.” (emphasis)

This position was again taken in the case of *Kassim Ali v Republic*, [2006] eKLR thus:-

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence.”

Yet again a similar view was taken in the case of *Benjamin Mbugua Gitau v Republic (supra)* where the court stated that there was no necessity of DNA test as penetration which is the main element of the offence was proved.

41. The evidence of the complainant in this appeal was that the appellant was the person who defiled her. The appellant was a neighbour, was known to the victim and she candidly described what happened and the trial court believed her. The trial court conducted *voire dire* examination and was satisfied that the complainant was possessed of sufficient knowledge on the need to tell the truth, thus allowed her to be affirmed. After her evidence in chief, she went through cross examination without a hitch. It cannot therefore be argued that there was no evidence to link the appellant to the offence, of defilement or the prosecution did not prove its case beyond reasonable doubt. The complainant’s evidence, that of PW1 and the P3 form proved the case of defilement against the appellant.
42. Mr Anziya, took issue with the trial court which after conducting *voire dire* examination, remarked that PW4 was trustworthy even before she testified. In counsel’s view, this was premature and portrayed the trial court as biased and partial. Learned counsel cited article 50(1) of the *Constitution* which requires that disputes be resolved by an impartial court or Tribunal.
43. The learned magistrate formed the view that the witness (PW4) was intelligent and truthful and for that reason, she was affirmed. I do not think the statement complained of in any way prejudiced the appellant. The appellant who was represented by an advocate, was given the opportunity to cross examine PW4, and I do not think article 50(1) of the *Constitution* was violated in any way. Counsel for the appellant has not pointed out anywhere in the record that would indeed show the fact of partiality on the part of the trial court. The statement that the witness was intelligent and truthful cannot, without more, be a basis for concluding that the trial court was partial. Having perused the record, I am satisfied that the statement was informed by the questions put to PW4 and the answers to those questions. It was not prejudicial to the appellant.



44. Finally, on the appellant's complaint that the learned magistrate erred in finding that corroboration was not required in the circumstances of the case, I find that the learned trial magistrate properly addressed herself on the evidence and the law and came to the right conclusion that based on the evidence on record, corroboration by other evidence was not required. There was credible and tangible evidence before court that proved the offence of defilement. The sentence meted out is legal.
45. Having carefully considered the evidence on record, re-evaluated it myself, considered the authorities and applied the law, I come to the conclusion that this appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED KAKAMEGA THIS 18TH DAY OF AUGUST, 2016.

E.C. MWITA

JUDGE

